

②

No. 89-1471

Supreme Court, U.S.  
FILED

MAY 18 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

SIDNEY R. BELL AND SCOTT J. ZIEBARTH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

KENNETH W. STARR  
*Solicitor General*

EDWARD S.G. DENNIS, JR.  
*Assistant Attorney General*

DEBORAH WATSON  
*Attorney*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

**BEST AVAILABLE COPY**

## QUESTIONS PRESENTED

1. Whether the initial encounter between law enforcement officers and petitioners was a "seizure" for Fourth Amendment purposes because the officers suspected petitioners of having committed a crime.

2. Whether the detention of petitioner Ziebarth at Salt Lake International Airport for questioning, and of petitioner Bell's package for inspection by a narcotics-detection dog, was supported by reasonable suspicion that petitioners were engaged in narcotics trafficking.



## TABLE OF CONTENTS

	Page
Opinion below .....	1
Jurisdiction .....	1
Statement .....	1
a. Events leading to Ziebarth's arrest .....	3
b. Events leading to Bell's arrest .....	5
Argument .....	8
Conclusion .....	13

## TABLE OF AUTHORITIES

### Cases:

<i>Brown v. Texas</i> , 443 U.S. 47 (1979) .....	11
<i>Florida v. Royer</i> , 460 U.S. 491 (1983) .....	8
<i>INS v. Delgado</i> , 466 U.S. 210 (1984) .....	8
<i>Maryland v. Macon</i> , 472 U.S. 463 (1985) .....	10
<i>Michigan v. Chesternut</i> , 486 U.S. 567 (1988) ...	8
<i>Reid v. Georgia</i> , 448 U.S. 438 (1980) .....	11
<i>Scott v. United States</i> , 436 U.S. 128 (1978) ....	10
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968) .....	11
<i>United States v. Cortez</i> , 449 U.S. 411 (1981) ...	11, 12
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980) .....	8, 11
<i>United States v. Sokolow</i> , 109 S. Ct. 1581 (1989) .....	11
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983) .....	10

### Constitution and statute:

U.S. Const. Amend. IV .....	8, 10
21 U.S.C. 841(a)(1) .....	2



# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1471

SIDNEY R. BELL AND SCOTT J. ZIEBARTH, PETITIONERS

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

---

## **BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

### **OPINION BELOW**

The opinion of the court of appeals, Pet. App. 1-70, is reported at 892 F.2d 959.

### **JURISDICTION**

The judgment of the court of appeals was entered on December 22, 1989. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **STATEMENT**

Following a bench trial in the United States District Court for the District of Utah, petitioner Ziebarth was convicted

of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Bell was convicted of attempted possession of cocaine with intent to distribute it, in violation of the same provision. Petitioner Ziebarth was sentenced to 15 months' imprisonment. Petitioner Bell was sentenced to five years' imprisonment (all but 179 days of which was suspended in favor of four and one-half years' probation), to a special parole term of three years, and to a \$5,000 fine. The court of appeals affirmed.

1. On December 22, 1986, Mark Whittaker, a Utah State Narcotics Agent, was monitoring flights arriving at Salt Lake International Airport from Los Angeles, a known source city for narcotics. Upon the arrival of one flight from Los Angeles, Agent Whittaker saw a man with a shoulder bag get off the plane. The man, later identified as petitioner Ziebarth, walked to a group of telephones, looked around, and then walked across the hallway to another group of telephones. Ziebarth picked up three or four of the telephones but did not appear to be making any calls. After going to a restroom for a few minutes, Ziebarth returned to one of the groups of telephones. Although he appeared to be dialing this time, Ziebarth did not appear to be talking, and Agent Whittaker did not see him put any money in the telephone. Ziebarth appeared nervous. Pet. App. 4-5; Gov't C.A. Br. 2-3.

Agent Whittaker followed Ziebarth as he left the telephone area and began walking toward the terminal exit. Approximately five times Ziebarth turned around and nervously checked behind him. Ziebarth entered a lounge area, looked around and then left, walking in the direction of escalators leading to the exit. Near the top of an escalator he met petitioner Bell. The two men greeted each other and briefly embraced. As they rode down the escalator, they turned away from each other, stood back to back, and stopped speaking. At the bottom of the escalator, Agent

Whittaker met Deputy Bart Palmer and Officer Terry Steed of the Salt Lake County Sheriff's Office and described what he had observed. Pet. App. 5-6; Gov't C.A. Br. 3-4; Pet. Bell's C.A. Br. 2.

Still inside the terminal, petitioners walked to the far east side of the building, turned around, and walked to the far west end of the building. As they did so, both men continued to look behind them. Several times, Bell turned completely around and was walking backwards while Ziebarth looked over his shoulder on several occasions. Neither man collected any luggage before departing the terminal. As petitioners walked toward a parking lot, Bell saw Agent Whittaker and Deputy Palmer walking toward them. Bell then abruptly turned and walked away from Ziebarth. At that point, Whittaker and Palmer approached Ziebarth, and Steed approached Bell. Pet. App. 5-6; Gov't C.A. Br. 3-4.

a. *Events leading to Ziebarth's arrest.* Deputy Palmer, who like Agent Whittaker and Officer Steed was in plain clothes, approached Ziebarth, identified himself as a police officer, and asked to speak with Ziebarth for a moment. Ziebarth agreed. When asked if he was waiting for someone, Ziebarth responded that Bell had picked him up and that he was not waiting for anyone. Palmer then asked to see Ziebarth's plane ticket and driver's license. Ziebarth complied. After checking the ticket against Ziebarth's driver's license, Palmer returned them. Pet. App. 16-17.

Ziebarth asked Palmer what the problem was and Palmer advised Ziebarth that he was a narcotics officer and often spoke to travelers in an attempt to locate narcotics being brought into Salt Lake City. Ziebarth became visibly nervous and started looking around. Palmer asked if he could look through Ziebarth's nylon bag, and Ziebarth asked him what was he looking for. Palmer said he was looking for narcotics or large amounts of money, and he advised Ziebarth of his right to refuse the search. Ziebarth



handed the bag to Palmer, who searched it and found nothing. After returning the bag to Ziebarth, Palmer asked him if he had drugs or large amounts of money on his person. Ziebarth replied that he did not. At that point, Whittaker went to assist Steed with Bell. Pet. App. 17-18; Gov't. C.A. Br. 5.

After Whittaker left, Palmer asked Ziebarth if he could search the bulging zippered pockets on the shoulders of Ziebarth's leather jacket. Ziebarth again asked what Palmer was looking for, and Palmer replied that he was looking for drugs. Ziebarth reached up to unzip his left pocket, but he had difficulty opening it because his hand was shaking so badly. Ziebarth eventually pulled out a manila envelope and explained that it contained about \$3,000. Palmer pointed to Ziebarth's right pocket and asked what was in that pocket. Ziebarth indicated that it contained more money. When asked how much, Ziebarth eventually responded that he was carrying about \$7,000. Palmer asked why Ziebarth had stated before that he did not have a large amount of money on his person; Ziebarth said that \$7,000 was not a large amount of money to him. Palmer then asked why Ziebarth was carrying so much. Ziebarth replied that he had just come from Hawaii, and that the money was for an attorney who had done some mortgage foreclosure work for him there. In response to Palmer's query why he had not paid the attorney while he was in Hawaii, Ziebarth stated that he did not know why, but he was going to get a cashier's check and mail it. Palmer remarked that Ziebarth's explanation sounded strange, at which point Ziebarth volunteered that the attorney was not a real attorney but some kind of mortgage attorney and that he owed money on his mortgage so that his home would not be foreclosed. Pet. App. 18-20; Gov't C.A. Br. 6-7.

Palmer advised Ziebarth that he was going to detain him a few minutes until he could determine whose money

Ziebarth was carrying and why Ziebarth had it. Palmer asked Ziebarth if he would mind going to the office to straighten out the money situation, and Ziebarth replied "fine." Upon reaching the office, however, Ziebarth dropped his bag and bolted down the concourse. He was tackled and arrested. A subsequent search of his person produced ten and one-half ounces of cocaine. Pet. App. 20-21.

b. *Events leading to Bell's arrest.* Steed, who was also in plain clothes, identified himself to Bell as a police officer and asked if he could speak to him. Bell agreed. When Steed asked Bell if he was Ziebarth's friend, Bell replied that he was not. Steed then asked: "Aren't you a friend of his, aren't you with him or a friend of his?" Bell responded: "Not really." Steed observed that Bell was turning his right shoulder in an attempt to hide a rolled-up denim jacket that was under his arm, from which protruded a brown paper bag. When asked, Bell denied that there was anything in the bag. Steed again inquired about the contents of the bag, and Bell stated that it was personal. Steed asked if he could touch the bag for his own safety, to assure himself that it did not contain a weapon. Bell replied: "No, it's personal, it's not a weapon. You don't have to worry about it." Pet. App. 7-9.

Steed informed Bell that he was a narcotics officer assigned to keep narcotics from entering Utah through the airport. Bell's level of nervousness increased dramatically, and he began breathing more heavily. When asked why he was nervous, Bell stated that he was always nervous when confronted by police, and hurriedly denied that anything in the bag was causing him to be nervous. Steed motioned Whittaker over and described his conversation with Bell. Whittaker told Bell that he was going to detain the package for the purpose of having a narcotics-detection dog check out the package. When Bell asked if Whittaker could legally talk to him and detain the package, Whittaker replied that he could and that Bell could either take a receipt for the

package and reclaim it after the dog had checked it, or accompany Whittaker to the security office. Bell responded that he did not want Whittaker to look at the package. When Whittaker told Bell that the check would take only a few minutes, Bell agreed to go to the office. Pet. App. 7-12.

Carrying the package, Bell accompanied Whittaker to the security office some 200 feet away in the main terminal. There, Whittaker told Bell that he would take the package upstairs for the dog to check. Bell protested that he wanted to accompany Whittaker, but Whittaker replied that it was policy not to have anyone else around the dog when it was working. When Bell continued to protest, Whittaker began to call for assistance. Bell then stated, "oh well, never mind," and handed Whittaker the package. Upstairs, a narcotics-detection dog alerted to the package twice. Whittaker summoned Bell upstairs and informed him that the dog had alerted to the package. Bell denied that the package contained narcotics. Whittaker arrested Bell and advised him of his *Miranda* rights. Bell then stated that the package contained money. Whittaker opened the package, which contained \$13,800 cash. After counting it, Whittaker gave Bell a receipt for the money and released him. Pet. App. 12-16.

2. The district court denied petitioners' motions to suppress the cocaine and the money. The district court found that Ziebarth was not seized until Palmer told him that he was going to detain him to check the source of the money, at which point reasonable suspicion supported his temporary detention. The court further found that probable cause to arrest arose when Ziebarth bolted, and that the narcotics were seized pursuant to a valid search incident to arrest. Pet. App. 23-24.

With respect to Bell, the district court found that the initial encounter had been consensual; that there was sufficient justification to detain Bell's package for a dog sniff; and that probable cause to arrest Bell arose when the dog

alerted to the package. The court found that Bell had then consented to the search of the package. Pet. App. 24-25.

3. The court of appeals affirmed. It found that the encounter between Ziebarth and Deputy Palmer was consensual up to the time Palmer advised Ziebarth that he would be briefly detained in order to determine the ownership of the money. Pet. App. 28-36. The court of appeals found that during that period Ziebarth had validly consented to the examination of his airline ticket, as well as to the search of his bag and coat pockets. Pet. App. 36. The court further held that, assuming the encounter ceased to be consensual when Palmer told Ziebarth he would be briefly detained, the ensuing detention did not constitute an illegal arrest, but was merely a permissible temporary detention based on a reasonable suspicion that Ziebarth was transporting illegal drugs. Pet. App. 36-43.

As to petitioner Bell, the court of appeals found that no seizure occurred until Agent Whittaker took Bell's package. Pet. App. 43-45. The court further held that the detention of Bell's package did not exceed the permissible limits of a temporary investigative detention, and was supported by a reasonable suspicion that the package contained contraband. Pet. App. 44-49. Thereafter, the court held, the dog's alerting to the package provided the requisite probable cause to arrest Bell and to search his person. Pet. App. 49.

Judge Ebel concurred in part and dissented in part. Pet. App. 53-70. He joined that portion of the majority opinion affirming petitioner Ziebarth's conviction, but dissented from the majority's conclusion that the officers had a reasonable suspicion that Bell was engaged in criminal activity at the time they seized his package. In his view, Bell's behavior "was [no] different from that of thousands of other travelers who pass daily through air terminals," and his responses and behavior when confronted by the police were

“no different from that which could reasonably be expected of a law abiding citizen.” Pet. App. 66.

### ARGUMENT

Petitioners contend that they were “seized” for Fourth Amendment purposes when they were first approached by the law enforcement officers, Pet. 20-28, and that the seizures were not supported by reasonable suspicion that they were carrying narcotics, Pet. 28-35. These fact-bound questions were correctly decided by both courts below and do not merit review by this Court.

1. In *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court reiterated its “clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account ‘all the circumstances surrounding the incident’ in each individual case.” *Id.* at 572 (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984), which in turn quoted *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). The Court also made clear that police conduct rises to the level of a Fourth Amendment seizure “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Id.* at 573 (quoting *United States v. Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.)). Accord *INS v. Delgado*, 466 U.S. at 215; *Florida v. Royer*, 460 U.S. 491, 502 (1983).

a. Here, both courts below correctly concluded that the initial encounters between the police and petitioners were not seizures under the Fourth Amendment. Deputy Palmer approached Ziebarth and asked if he would mind talking for a moment. Ziebarth readily agreed to talk with Palmer, and just as readily complied with Palmer’s request to see his airline ticket and driver’s license. Palmer immediately

returned the ticket and license to Ziebarth. Palmer then requested Ziebarth's permission to look through his bag and expressly advised him of his right to refuse consent. Ziebarth agreed to the search. When asked about his zippered pockets, Ziebarth reached up and himself unzipped the pockets and handed Palmer the envelope which he said contained about \$3,000. When asked about the other pocket, Ziebarth volunteered that it contained more money and that he was carrying about \$7,000, which he was going to use to pay an attorney. These events took place in a public area, the officers were in plain clothes, and no weapons were displayed. Under these circumstances, where there was nothing to suggest that Ziebarth could not have left at any time, the courts below properly concluded that no seizure had occurred up to that point.

Like Ziebarth, petitioner Bell agreed to stop and talk when asked to do so by Officer Steed. Bell willingly answered questions concerning his relationship with Ziebarth. When questioned about the paper bag that he was carrying, Bell denied that it contained anything of significance and refused to allow Steed to feel the bag. At that point, Steed did not restrain Bell or insist on feeling or looking into the paper bag. These circumstances support the finding by both courts below that the encounter between Bell and Steed was entirely consensual up to the point at which Steed detained Bell's package.

b. Recognizing that objective circumstances indicated that petitioners were free to terminate their respective conversations at any time, petitioners argue that when an officer *subjectively* suspects an individual of committing a crime, any ensuing encounter between an individual and a police officer "can never be characterized as consensual in nature." Pet. 27. In petitioners' view, only "normal intercourse" between citizens qualifies as "[c]onsensual encounters between police and citizens." Pet. 27-28. "The en-



counter loses its consensual nature when the encounter is based upon suspicious circumstances as viewed by the officer." Pet. 28.

Petitioners offer no support for their theory that the consensual nature of an encounter turns on the subjective beliefs of one of the parties. In every case in which this Court has distinguished consensual encounters from seizures that must be supported by reasonable suspicion, the original encounter was prompted by the officer's suspicion that the defendant was committing a crime. Furthermore, the Court has repeatedly made clear that the "reasonableness" of searches and seizures for purposes of the Fourth Amendment must be determined by reference to an objective standard. See *Scott v. United States*, 436 U.S. 128, 138 (1978); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). As the Court explained in *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985) (citation omitted): "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken." An officer's suspicion that a crime has been committed has a bearing on the issue whether a seizure has occurred only to the extent that his suspicion is relayed to the suspect and would lead the suspect to believe that he was not free to leave. Even then, the suspect's awareness that he is suspected of having committed a crime is but one factor to consider in determining whether a reasonable person would believe that he was not free to leave. The subjective motivation of the law enforcement agents in this case does not override the lower courts' finding that neither petitioner was seized within the meaning of the Fourth Amendment until the officers announced that they were going to detain Ziebarth for a few minutes and were going to have a narcotics-detection dog sniff Bell's bag.

2. The detentions of Ziebarth and petitioner Bell's bag were based on reasonable suspicion, as both courts below determined. An officer may make a brief investigative stop of a person when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The factors supporting a finding of reasonable suspicion must be viewed in light of the inferences and deductions that a trained and experienced officer would make. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *United States v. Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979). "[A] series of acts, each of them perhaps innocent in itself, \* \* \* taken together [may] warrant[ ] further investigation." *Terry v. Ohio*, 392 U.S. at 22. See *United States v. Cortez*, 449 U.S. at 417-418 ("the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account"); *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989) (a series of acts, perhaps innocent if viewed separately, may amount to reasonable suspicion when taken together); *Reid v. Georgia*, 448 U.S. 438, 441 (1980).

a. At the time Deputy Palmer told Ziebarth that he would be briefly detained while his ownership of the money was verified, the officers had good reasons to suspect that Ziebarth was involved in the narcotics trade. The officers had seen Ziebarth engage in suspicious behavior, including pretending to make telephone calls, repeatedly checking to see if he was being observed or followed, feigning a lack of acquaintance with Bell immediately after greeting and embracing him, and surreptitiously splitting up with Bell when he saw the officers approach. During his conversation with Deputy Palmer, Ziebarth became so nervous that he had difficulty operating a zipper and falsely denied his possession of several thousand dollars in cash. When Deputy



Palmer asked him why he had so much money, Ziebarth offered the bizarre explanation that he was going to use it to pay a Hawaiian attorney (who was not really an attorney) even though Ziebarth had just left Hawaii. The officers' observation of Ziebarth's nervous attempts to avoid detection, Ziebarth's lie about possessing thousands of dollars, and his incredible explanation for the money, provided reasonable grounds for briefly detaining Ziebarth. Both courts below were unquestionably correct in upholding the officers' judgment.

b. At the time Officer Steed and Agent Whittaker informed Bell that they needed to detain his package, the officers were well aware of petitioners' suspicious attempts to avoid detection, including in particular Bell's walking backwards to see if he was being observed or followed, his contrived effort to distance himself from Ziebarth after having previously greeted and embraced him, and Bell's attempt to split up with Ziebarth when he saw the officers approach. Moreover, as the court of appeals noted, "Ziebarth's conduct could be added to Bell's \* \* \* for the purpose of determining whether reasonable suspicion existed." Pet. App. 47.

The officers also observed suspicious behavior by Bell in his conversation with Officer Steed. Bell's level of nervousness increased dramatically when he learned that Steed was a narcotics officer. Bell falsely denied that he was with Ziebarth or that Ziebarth was a friend of his. And Bell repeatedly turned his body in an attempt to hide the package he was carrying. The officers' observation of Bell's countermeasures to avoid detection, his anxiety and false denial about knowing Ziebarth, and his obvious attempt to conceal the package, gave the officers reasonable grounds to detain the package to determine whether it contained contraband. Experienced narcotics officers viewing the whole picture, see *United States v. Cortez*, 449 U.S. at 417, could

reasonably suspect from those facts that petitioners were trafficking in narcotics.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

EDWARD S.G. DENNIS, JR.  
*Assistant Attorney General*

DEBORAH WATSON  
*Attorney*

MAY 1990